In the Supreme Court of the United States.

THE UNITED STATES, APPELLANT,
v.
THE RIO GRANDE DAM AND IRRIGATION COMPANY et al., appellee.
No. 215.

REPLY TO BRIEF FOR APPELLEE.

I.

The clause at the end of article 7 of the treaty of Guadaloupe Hidalgo in these words: "the specifications contained in the present article shall not impair the territorial rights of either Republic within its own established limits," is irrelevant.

The obvious purpose of this was to affirm what would probably have been held to be the effect of the treaty without positive affirmation; that although navigation was to be common to the citizens of the two Republics, yet that the territorial rights of each should go to the middle of the river, following the deepest channel, as provided in article 5, thus designating the river, not as common territory for the exercise of sovereign rights, but merely as

common territory for purposes of navigation by citizens of the two Republics.

This clause certainly could not be strained so as to negative the right which each nation had to insist that no act should be done by one or the other which should impair the navigation of the river.

The inhibition of the treaty is against any work that may impede or interrupt, in whole or in part, the exercise of the right of common navigation.

Nothing in the language of the treaty confines the prohibited works to points on the river where it is navigable.

II.

Article 5 of the convention of March 1, 1889, quoted on page 12 of the brief for the appellee, is also irrelevant.

The article provides that whenever the local authorities on any point of the frontier between the United States of America and the Republic of Mexico in that portion in which the Rio Grande and Colorado form the boundary between the two countries shall think that works are being constructed in either of those rivers contrary to the former treaties they shall so notify their respective commissioners, etc.

It will be observed that the effect of this is to give the right of notification to the local authorities on any point of the frontier in that portion in which the Rio Grande and Colorado rivers form the boundary between the two countries. This clause defines what local authorities may complain.

The next clause defines what they may complain of, namely, that works are being constructed in either of

those rivers such as are prohibited by the treaties. This latter clause does not specify that the works complained of shall be within the parts of the river which are navigable.

III.

Counsel makes the point that the amended bill of complaint does not sufficiently allege the navigability of the river at Elephant Butte. He says (brief, p. 21): "There is a vast difference between a navigable river and one susceptible of navigation."

On this subject, I refer counsel and the court to the language of the Supreme Court in the case of *The Daniel Ball* v. *The United States*, quoted by counsel in his brief on page 29, as follows:

> Those rivers must be regarded as also navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or susceptible of being used in their ordinary condition as highways for commerce.

Undoubtedly the pleader had this very language in mind when he drew the bill of complaint.

What the pleader evidently was trying to state was that although the river had not, as a matter of fact, been navigated all the way up to La Joya, yet it was capable or susceptible of navigation.

The mere fact that a large river, with ample water to transport vessels, lies in an unsettled or uninhabited territory and has, as a matter of fact, never been so navigated, does not justify a claim that it is not a navigable river.

IV.

Counsel for appellee contends in his fifth point that the right to construct the proposed works had become vested.

There can be no vested right to commit a public wrong. The contention of the Government is that none of the acts or proceedings set up by the defendant authorized them to injure the navigation of the river by diverting the whole current.

V.

There seems to be some discrepancy in the record as to exactly what was intended to be heard by the court below and upon what sort of a motion it was brought up.

On page 57 of the record is a motion on behalf of the plaintiff to set down the joint and several pleas for argument as to their sufficiency as a defense to the suit as a matter of law. By the order of continuance, printed on page 118 of the record, it is stated as follows: "This cause coming on to be heard upon the order to show cause why the temporary injunction heretofore granted herein should not be continued in force and respondent's motion to dissolve said injunction heretofore filed." Then follow various continuances on pages 119, 120, and 121.

The final order is printed on page 122. It recites that this cause coming on to be heard under the rule heretofore made upon the defendant to show cause why the injunction heretofore granted should not be continued, and the complainant having filed an amended bill, etc., and the defendant having filed a special plea in bar, and

having also answered said amended bill, and also filed a motion to dissolve the injunction and to dismiss the original and amended bills, and the complainant having filed its motion to set down defendants' pleas for argument as to their sufficiency as defense to said suit as a matter of law, and the court having heard the arguments of counsel, and having read the affidavits, extracts from geological reports, etc., and being fully advised thereby, *doth take judicial notice of the fact and doth thereby determine that the Rio Grande River is not navigable within the Territory of New Mexico, and doth find, as a matter of law, that said amended bill does not state a cause entitling the complainant to the relief prayed for in the prayer of said amended bill, and that the same is without equity*, etc. Thereupon the court ordered that the injunction be dissolved and the cause be dismissed.

VI.

Counsel for appellee refers to the case of *The Montello* (11 Wall., 411) as indicating that in questions of doubt as to the navigability of a stream the court will resort to public records, etc., to determine the question.

A reading of the case discloses that exactly the reverse is true, because in that case the court reversed the order of the court below dismissing the libel, and ordered that the case be remanded and that the allegations and proofs be made to conform to the facts, so as to present the question as to whether Fox River was a navigable stream of the United States.

VII.

The act of July 13, 1892 (see original brief of appellant, p. 58), confers upon the Secretary of War jurisdiction to approve dams in navigable waters.

If the object of the defendants is to use freshet waters for impounding purposes in such a manner as not to deplete the supply of water in the river below for the purposes of navigation, and their plans are consistent with such a purpose, they ought to submit them to the Secretary of War and receive his approval. They ought not to be allowed to proceed and build their dam against the direct allegation of the United States that they will, by the scheme of works which they contemplate, deplete and destroy the navigable capacity of the river.

VIII.

Counsel for the defendants in his argument asserted that the prosecution of this suit was a subterfuge, and that it was not desired to protect navigation but to preserve the waters of the river for a rival irrigation scheme.

This is emphatically denied. The suit was brought by the Attorney-General at the original request of Mr. Olney while Secretary of State, and for the precise purpose that the bill declares. The imputation of bad faith to the Government, or to any department of it, in a matter of this kind ought not to be entertained by the court.

JOHN W. GRIGGS,
Attorney-General.